question remains. Is this "necessary result" forecast from the face of the statute alone, or does the court inquire into the actual subsequent events? If the latter, then the statute under discussion may be distinguished from that in the *McCray* case, if the earlier tax actually produces revenue and that on child labor does not.[35] But to make this distinction fruitful, the language of the *McCray* and other cases must be overruled so far as they hold that the face of the statute is the only basis of comparison with the Constitution. And it is submitted that *Hammer* v. *Dagenhart* need not go to that length, and perhaps should not.[36] Should it be settled that the correspondence upon the face of the statute is the only test, it will not be the only point in the division of powers at which the function of the court approaches the ministerial.[37]

FEDERAL CONTROL OF INTRASTATE RAILROAD RATES. — The power to regulate commerce left to the states by the commerce clause[1] includes power not only to adopt regulations over intrastate commerce which in no way affect interstate commerce, but also some that do. The scope of the states' power thus to affect interstate commerce is varying and is determined by two doctrines: (1) no power exists to burden directly interstate commerce, or to legislate as to matters requiring national uniformity, even in the absence of congressional action;[2]

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authorities must be used upon the present question with extreme caution, for the question in such cases is whether the state act invades a federal power, while the question here is not whether a federal act invades a state power, but passes the outer bounds of the federal power under which it purports to justify. See McCray *v.* United States, *supra*, at 60.

[35] See Annual Report of the Commissioner of Internal Revenue for the Fiscal Year ending June 30, 1921, pp. 16, 23.

[36] Whatever might be the desirability of such an express doctrine in the Constitution, it would be extraordinarily unfortunate if a narrow doctrine of "fraud on a power" should be taken over from property law and applied to the great powers of government upon a ground that those powers were so assimilated to ordinary agencies as to require that result by implication. As to motives, therefore, the McCray case must be right; especially considering (1) the almost impossibility of judicially determining the motives of a majority of Congress, (2) the undignified nature of such a proceeding, and (3) that a law well within the power in question might be invalidated because of the motives merely. Some of these considerations are of less weight as arguments against looking beyond the face of a statute to ascertain its necessary result. But a fourth is added, — that the Constitutionality of a "tax" might be made to turn upon whether Congress guesses with precise accuracy the rate of tax at which it will not be so discouraging as to preclude all revenue. Yet it is hard to say that from the point of view of the objects of the tax power it will be any loss to have the law unconstitutional unless Congress does make the guess correctly. The real answer to this is a question of judgment. Which is more desirable: that the national powers shall be capable of unified dealing with as many national problems as possible; or that the lobbies of organized minorities be compelled to seek the approval of forty-eight rather than one legislative body? It is the belief in the latter which gives rise to a desire to moderate the federal powers. The good and the evil must be taken or left together.

[37] *Cf.* the field of "political questions." Luther *v.* Borden, 7 How. (U. S.) 1 (1849); Pacific States Tel. Co. *v.* Oregon, 223 U. S. 118 (1912). Such a question being the issue raised by the writ of error to the state court in the last named case, the writ was dismissed for want of jurisdiction.

[1] CONSTITUTION OF THE UNITED STATES, Art. I, § 8, Par. 3.

[2] A state cannot prescribe rates to be charged for interstate transportation. Wabash, St. Louis & Pacific Ry. Co. *v.* Illinois, 118 U. S. 557 (1886). A state cannot

(2) power does exist, until Congress acts, to regulate for the public welfare matters of local concern.[3] Nine years ago in the *Minnesota Rate Cases*[4] the Supreme Court declared it is the second of these doctrines which determines the states' power to regulate intrastate rates. The Interstate Commerce Act at that time prohibited undue discriminations against particular persons or localities.[5] No such discriminations were found by the Interstate Commerce Commission in that case, and the court, while recognizing that the state's action indirectly disturbed the relation between rates in the two kinds of commerce, sustained the state's power to regulate. One year later, in the *Shreveport Case*,[6] the commission found unfair discriminations against localities in Louisiana in favor of Texas points caused by intrastate rates fixed by Texas. The court ordered the roads to desist their discriminatory practices, which order necessitated a disregard of those particular Texas rates found to be such. Thus was determined for the first time that Congress, by the Act to Regulate Commerce, had partially restricted the powers of the states over intrastate rates.

In 1920 the Transportation Act[7] was passed, broadening the powers of the commission. It ordered the commission to take steps to maintain an adequate railway service for the people of the United States.[8] It required the commission to prescribe rates so that the carriers as a whole or in groups should earn an aggregate net income equal to a reasonable return on their aggregate property values.[9] It empowered

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tax property in transit in interstate commerce. Coe *v.* Errol, 116 U. S. 517 (1886). A state may not regulate tolls upon a bridge connecting it with another state. Covington and Cincinnati Bridge Co. *v.* Kentucky, 154 U. S. 204 (1893). See Minnesota Rate Cases, 230 U. S. 352, 398 (1913).

[3] Regulation of pilotage. Cooley *v.* Board of Wardens, 12 How. (U. S.) 299 (1851). Quarantine regulations. Morgan's S. S. Co. *v.* Louisiana, 118 U. S. 455 (1886).

[4] 230 U. S. 352 (1913). For a discussion of this case, see Hannis Taylor, "The Minnesota Rate Cases," 27 HARV. L. REV. 14.

[5] See ACT TO REGULATE COMMERCE, § 3, 24 STAT. AT L. 379. "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any manner whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[6] Houston, E. & W. T. R. Co. *v.* United States, 234 U. S. 342 (1914). For discussion and criticism of this case, see William C. Coleman, "The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases," 28 HARV. L. REV. 34; John S. Sheppard, Jr., "Another Word about the Evolution of the Federal Regulation of Intrastate Rates and The Shreveport Rate Cases," 28 HARV. L. REV. 294. See also 14 COL. L. REV. 294.

[7] This act took effect March 1, 1920. Among other things it provided for the termination of federal control. An interesting collection of articles and addresses antedating the passage of this act, which discuss its proposed provisions, and related topics, can be found in the January, 1920, publication of the Academy of Political Science. See 8 ACADEMY OF POLITICAL SCIENCE, No. 4.

[8] See INTERSTATE COMMERCE ACT, § 15 a, Par. 3, 41 STAT. AT L. 488.

[9] See INTERSTATE COMMERCE ACT, § 15 a, Par. 2, 3, 41 STAT. AT L. 488. Paragraph 3 of this section provides that during the two years beginning March 1, 1920, 5½ per cent, with an additional ½ per cent for improvements at the discretion of the commission, shall be a fair return. At the expiration of that period, the commission shall from time to time determine what percentage constitutes a fair return. For a

the commission to deal directly with intrastate rates which were unduly discriminatory, not only against persons or localities, but also *against interstate commerce as such.*[10] The effect of these amendments has been recently determined in the case of *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company*,[11] wherein the Supreme Court unanimously sustained an order of the commission imposing a horizontal increase in all Wisconsin rates beyond the point fixed by that state. The court first examined and overruled the contention that the order could be sustained on a showing of discrimination against persons or localities under the doctrine of the *Shreveport Case*[12] on the ground that the order was too sweeping. The court then examined and sustained the claim that the order was necessary to prevent discrimination against interstate commerce as such. It reasoned, in effect, that as the commission was under a duty to fix rates to insure a fair return on the aggregate value of the carriers' property engaged in transportation,[13] unless it could fix the general level of the intrastate rates so that intrastate traffic could produce its fair share of income, it must increase the interstate rates to take care of the loss to the carriers derived in intrastate transportation due to lowered intrastate rates. The results of the latter course would produce an unjust discrimination against interstate commerce. This the Act declares unlawful. It is apparent that the effect of the Transportation Act is to restrict further the power of the states over intrastate rates. But this is not an attempt by Congress to regulate intrastate rates as such. The Act disclaims that power.[14] It is but an incident of the exercise of the supreme power of Congress over interstate commerce.[15] The case enunciates no new principle of law; it but applies existing principles to changed facts. Transportation is to-day so vastly important in the economic life of the country that an adequate railway service, national in character, must be secured. Interstate and intrastate commerce are now so indistinguishably blended that a regulation of the former, adequate to secure present needs, requires a broadened regulation of the relation between them by Congress, and a consequent restricted power of the states over the latter. However, the states' power is but limited, not destroyed. As the general level of intrastate rates discriminates against interstate commerce it must be changed, but the burden of detailed regulation remains with the states. Efficient rate regulation will demand increased coöperation between the Interstate Commerce Commission and the state regulating bodies.

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criticism of this legislation and suggested changes, see GARTNER, COMMENTARIES ON THE INTERSTATE COMMERCE ACT, 41.

[10] See INTERSTATE COMMERCE ACT, § 13, Par. 3, 4, 41 STAT. AT L. 488.

[11] U.S. Sup. Ct., Oct. Term, 1921, No. 206. For the facts of this case, see RECENT CASES, *infra*, p. 886.

[12] See note 6, *supra*.

[13] See note 9, *supra*.

[14] See INTERSTATE COMMERCE ACT, § 1, Par. 2, 41 STAT. AT L. 474.

[15] "This power, like others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Per* Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 196 (1824).

This can be achieved through conferences. Willingness on the part of the states to coöperate will do much toward decreasing the necessity for stringent federal control and go far toward facilitating the work of the commission.

THE EFFECT OF A DEFENDANT'S REFUSAL TO RETRACT ON A QUALIFIED PRIVILEGE IN DEFAMATION. — The victim of a defamatory publication and the public are interested in having the author make an adequate retraction. The public is interested in the truth. The victim is interested in the restoration of his reputation. The German law permits a plaintiff who cannot show economic injury to secure a retraction (*Ehrenerklärung*).[1] The Dutch law allows generally the recovery of a similar "honorable amends."[2] In our law, a retraction has primarily evidential effect.[3] It is not a defense.[4] If, however, it is made in the same conversation with the utterance of a slander, and in such a way as to destroy its defamatory effect, it defeats recovery.[5] Further, a retraction may sometimes be shown in mitigation of damages.[6] It may be evidence of the absence of the "malice" necessary to punitive damages;[7] and it may be evidence that the plaintiff has suffered less than he claims in actual damages.[8] In many jurisdictions this subject is regulated by

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[1] See 2 CROME, SYSTEM DES DEUTSCHEN BÜRGERLICHEN RECHTS, 1028; SCHUSTER, THE PRINCIPLES OF GERMAN CIVIL LAW, 340. The French law authorizes a publication of a judgment for defamation at the defendant's expense. DEMOGUE, DE LA RÉPARATION CIVILE DES DÉLITS, 44–47; 4 GARSONNET AND CÉZAR-BRU, DE PROCÉDURE, 36–37. For a comment on an English case in which the court vindicated the plaintiff while rendering judgment for the defendant, see Roscoe Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640, 670. *Cf.* Couper *v.* Lord Balfour of Burleigh, [1913] S. C. 492.

[2] This is a civil remedy, concurrent with the recovery of "profitable amends." See DE VILLIERS, THE ROMAN AND ROMAN-DUTCH LAW OF INJURIES, 173–181; VAN DER LINDEN, INSTITUTES OF HOLLAND, § 152. A voluntary retraction will defeat the recovery of "honorable amends," and mitigate "profitable amends." See DE VILLIERS, *op. cit.*, 244–246.

[3] See Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning: Operative Facts Contrasted with Evidential Facts," 23 YALE L. J. 16, 25–28. For a full note on the subject of retraction, see 13 A. L. R. 794.

[4] Lehrer *v.* Elmore, 100 Ky. 56, 37 S. W. 292 (1896); Dixie Fire Insurance Co. *v.* Betty, 101 Miss. 880, 58 So. 705 (1912). It is good consideration for an agreement not to sue. Boosey *v.* Wood, 3 Hurl. & Colt. 484 (1864); Marks *v.* National Fire Insurance Co., 129 La. 903, 57 So. 168 (1911). Publication of a retraction on request does not, *per se*, constitute an accord and satisfaction. Dixie Fire Insurance Co. *v.* Betty, *supra*.

[5] Trabue *v.* Mays, 3 Dana (Ky.) 138 (1835); Linney *v.* Maton, 13 Tex. 449 (1855).

[6] Coffman *v.* Spokane Chronicle Publishing Co., 65 Wash. 1, 117 Pac. 596 (1911); Dixie Fire Insurance Co. *v.* Betty, *supra*. An offer to retract may similarly be shown in mitigation. Dalziel *v.* Press Publishing Co., 102 N. Y. Supp. 909 (1906). But an offer to publish a statement by the person defamed is not, in this respect, like an offer to retract. Constitution Publishing Co. *v.* Way, 94 Ga. 120, 21 S. E. 139 (1894). The failure of a plaintiff to request retraction is no mitigation. Coffman *v.* Spokane Chronicle Publishing Co., *supra*. On retraction and mitigation, see NEWELL, SLANDER AND LIBEL, 3 ed., § 1062.

[7] Fessinger *v.* El Paso Times Co., 154 S. W. 1171 (Tex. App., 1913); Myerle *v.* Pioneer Publishing Co., 178 N. W. 792 (N. D., 1920). It must be on this ground that an offer to retract is admissible in mitigation. Dalziel *v.* Press Publishing Co., *supra*.

[8] Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129 (1896); Myerle *v.* Pioneer Publishing Co., *supra*. Thus it has been held that, under a statute making it a bar to re-